Supreme Court, U. S.
FILED
SEP 11 1980
MICHAEL RODAK, JR., CLERK

80-395

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LESLIE MINYE
Petitioner,
v.
UNIVERSITY OF MICHIGAN, REGENTS OF THE UNIVERSITY OF MICHIGAN, EXECUTIVE COMMITTEE OF THE SCHOOL OF DENTISTRY OF THE UNIVERSITY OF MICHIGAN, AND SCHOOL OF DENTISTRY OF THE UNIVERSITY OF MICHIGAN,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

STEVEN STELMACH, JR. (P24866)
Attorney for Petitioner
2970 East Big Beaver Road
Troy, Michigan 48084

Of Counsel:
Steven Haffner (P24794)
25130 Southfield, Suite 102
Southfield, Michigan 48075
(313) 559-2970

Interstate Brief & Record Co., Wurlitzer Bldg., 1509 Broadway, Detroit, MI 48226
962-8745 962-8746

QUESTIONS PRESENTED

I.

WHETHER THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY DISMISSING PLAINTIFF'S ENTIRE COMPLAINT WITHOUT RULING ON PLAINTIFF'S DISCRIMINATION, CONSPIRACY AND BREACH OF CONTRACT CLAIMS?

II.

WHETHER THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT BASED ON THE UNVERIFIED CHRONOLOGY OF EVENTS WITH UNVERIFIED SUPPORTING DOCUMENTS PRESENTED IN THE SUPPLEMENTAL BRIEFS WITHOUT ACCORDING PLAINTIFF A HEARING REQUIRED BY LAW?

III.

WHETHER THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN FINDING THAT PLAINTIFF WAS NOT DENIED DUE PROCESS UNDER THE FOURTEENTH AMENDMENT, EVEN IF *BOARD OF CURATORS VS. HOROWITZ*, 435 U.S. 78, 98 S CT 948; 55 L ED 2d 124 (1978) WAS PROPERLY APPLIED RETROSPECTIVELY?

IV.

WHETHER THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT BASED ON NO GENUINE ISSUE OF MATERIAL FACT BY FINDING THAT DEFENDANTS DID NOT DISMISS PLAINTIFF IN AN ARBITRARY AND CAPRICIOUS MANNER WHEN ALLEGATIONS OF BAD FAITH ARE CONTAINED IN THE COMPLAINT?

TABLE OF CONTENTS

	Page
Questions Presented	i
Opinion and Order Below	2
Jurisdiction	2
Constitutional Provisions Involved	2
Statement of Facts	3
Relief Requested	25
Appendix A — Memorandum Opinion	26
Appendix B — Order Granting Summary Judgment	27
Appendix C — Judgment	28
Appendix D — Order	29

PREVIOUS PAGE WAS BLANK

AUTHORITIES CITED

Page

Cases

Adickes vs. S.H. Kress & Company 398 U.S. 144, 159; 90 S Ct 1598, 26 L Ed 2d, 142 (1970) 15

Board of Curators vs. Horowitz 435 U.S. 78, 98 S Ct 948; 55 L Ed 2d 124 (1978)(567a) 7,17,19

Felix vs. Young 536 F 2d 1126 at 1135 (1976) 24

Foley vs. Bennedict, et al, 122 Tex 193, 55 SW 2d 805 (1932); Anno. 86 ALR 484 13

Gaspar vs. Bruton, 513 F 2d 843 (1975) 13,22

Gaylord vs. Gaylord, 271 App Div 1045 68 NYS 2d 513 12

Greenhill vs. Bailey, 519 F 2d 5 (Ca 8 1975) 20 .. 17,20

Mahavongsanan vs. Hall, 529 F 2d 448 (Ca 5 1976) at 449 22

Poller vs. Columbia Broadcasting System, 368 US 464, 82 S Ct 486 (1961) 24

Sumitomo Shoji New York, Inc. vs. Isbrandtsen Co., 23 App Div 2d 752 (1975), 258 NYS 2d 1020 12

Tomanio vs. Board of Regents of University of State of New York 603 F 2d 255 (1979) 20

United States vs. Dibble, 429 F 2d 568 15

Robert Willits vs. Ford Motor Company and United Auto Workers of America, Local 898, 583 F 2d 852 16,23

Page

Constitution

1st Amendment, United States Constitution 11
5th Amendment, United States Constitution .. 11,14
14th Amendment, United States Constitution .3,11,14

Statutes

28 USC 1254 2
28 USC 1732 15
42 USC 1983 3,13
42 USC 1985 .....

Michigan Statutes

MCLA 37.2401, Elliott Larsen Civil Rights Act .. 12

Rules

Rule 56(d), Federal Rules of Civil Procedure 10
Rule 1005 Federal Rules of Evidence 15

Other Authorities

See Moore on Federal Practice 56.11 [1-8] 15

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LESLIE MINYE
Petitioner,
v.
UNIVERSITY OF MICHIGAN, REGENTS OF THE UNIVERSITY OF MICHIGAN, EXECUTIVE COMMITTEE OF THE SCHOOL OF DENTISTRY OF THE UNIVERSITY OF MICHIGAN, AND SCHOOL OF DENTISTRY OF THE UNIVERSITY OF MICHIGAN,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Leslie Minye, petitioner, respectfully prays that a Writ of Certiorari issue to review the order of the United States Court of Appeals for the Sixth Circuit entered in this cause on June 17, 1980.

OPINION AND ORDER BELOW

The opinion of the Court of Appeals for the Sixth Circuit has not yet been published and petitioner is without knowledge as to whether an opinion will be published.

The Order of the Court of Appeals for the Sixth Circuit dated June 17, 1980, and issued as Mandate on July 9, 1980, affirming the Judgment of the Eastern District Court of Michigan, Southern Division, is printed as Appendix D below.

JURISDICTION

The Order of the Court of Appeals for the Sixth Circuit was entered on June 17, 1980. See Appendix D below. Petitioner did not petition for rehearing or for rehearing En Banc.

Jurisdiction is conferred upon this Court by 28 USC § 1254.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in part:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law; . . ."

The Fourteenth Amendment to the United States Constitution provides in part:

> "Nor [shall any State] deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF FACTS

Petitioner filed a Complaint and Demand for Jury in the United States District Court for the Eastern District of Michigan, Southern Division, on October 6, 1977, naming respondents as Defendants. In his Complaint, Mr. Minye stated that he was born in Budapest, Hungary in 1948, emigrated to the United States in 1966, became a United States citizen in 1971, graduated from the University of Michigan with a Bachelor of Arts degree in 1972 and was admitted to the University of Michigan Dental School commencing with the class of September, 1972. (Complaint Paragraphs 6-10, (8a))* His Complaint alleged that he was dismissed from the University of Michigan School of Dentistry three months before graduation although he had maintained over the required 2.0 gradepoint average and has easily passed the required two part National Board Examination thereby constituting a breach of contract by Respondent, that he was deprived of rights, privileges, and immunities conferred to him under the Constitution and laws of the United States in violation of 42 USC 1983, that certain members of the faculty, individually and in concert, conspired to deprive Mr. Minye of his Constitutional, Statutory and contractual rights by causing him to receive non-passing grades in certain clinical courses, and that the acts of the Defendants deprived him of his opportunity to receive a Degree of Dental Surgery without affording him any basic precedent or antecedent procedural safeguards under the Fourteenth Amendment. (Complaint)

---

* The "T" in parentheses refers to transcript of Trial Court proceedings and the "a" refers to pages in the Joint Appendix filed on appeal to the Sixth Circuit Court of Appeals.

Respondents' Answer to Complaint with Affirmative Defenses and attachments was filed on December 1, 1977 wherein Respondents denied most of the substantive allegations of Plaintiff but specifically admitted that a 29 year old third semester dental student cannot find easy acceptance in other dental schools. (Respondents' Answer, Paragraph 20 (28a)) In addition, an exhibit was attached to Respondents' Answer which is a letter admitted by Respondents to have been sent to other dental schools explaining why Petitioner was dismissed from the University of Michigan Dental School which not only states that he was dismissed at the end of the first term of his senior year because of E grades in Clinical Operative Dentistry and Periodontics, but also, that Mr. Minye's background makes it difficult for him to communicate effectively with people which to a significant degree is responsible for many of his academic problems. (Respondents' Answer, Exhibit B, 39a)

Petitioner and Respondents filed Interrogatories and took several depositions, including that of respondent, some of his instructors and administrators.

Respondents filed a Motion to Dismiss and alternative Motion for Summary Judgment with Brief and attachments but without Affidavits. Supplements to Memorandum Brief in Support of Respondents' Motion to Dismiss with attachments were filed on September 29, 1978 and October 18, 1978 respectively. Petitioner filed an Answer in Opposition to Respondents' Motions with Brief and Affidavit with attachments (440a-446a) on November 16, 1978. (Docket entries, 4a)

The Honorable James P. Churchill, United States District Judge, held an oral argument hearing on December 22, 1978 (489a-523a) wherein the Court specifically recognized Mr. Minye's Complaint of arbitrary and capricious withholding of his D.D.S. Degree (Tr. 494a), recognized that the Court could grant relief if Petitioner's claim of discrimination on the basis of national origin was established (Tr. 498a-500a), recognized that Respondents' Motion was raising the issue of whether there is a genuine issue of fact on the issues so raised (Tr. 501a), recognized that Petitioner was entitled to be given the opportunity to have a hearing before the Executive Committee pursuant to dismissal and counsel for Respondents specifically acknowledged that such a Hearing requirement exists. (Tr. 502a)

Judge Churchill was also informed by counsel for Respondents that there was a hearing after each dismissal from the institution and after Petitioner's failure of two courses in the summer of 1977 and that he could produce a letter from Dean Doerr evidencing that Petitioner did have such an opportunity (Tr. 503a-504a), and the Court stated on the record that it had not read all of the Depositions (Tr. 503a). The University attorney admitted that it is essential for Petitioner to have an opportunity to appear at a meeting of the Executive Committee where his ultimate dismissal from the University was decided (Tr. 507a). The trial judge narrowed the Motion Hearing to the issue of minimal due process requirements afforded by Respondents (Tr. 508a). The trial Court was then informed by attorney for Respondents that the opportunity for an informal hearing before the Executive Committee occurred but that Petitioner did not attend and that the Executive Committee reviewed

all of his work (Tr. 580a), that the letter notified Mr. Minye of the time and place where he should appear after his ultimate dismissal (Tr. 590a), and that the Court ultimately announced that the issue before it was whether or not there is a genuine issue on the existence of an opportunity to appear at an informal hearing and was so acknowledged by counsel for respondents (Tr. 510a). Petitioner cites the foregoing factual statement of the Hearing dialogue for the reason that no such letter exists, or ever did exist, and no such notice and opportunity were given to Petitioner in August of 1977 before or after the Executive Committee determined that Petitioner should be dismissed and not allowed to return to the Dental School.

The Court at the December 22, 1978 hearing pursuant to Respondents' Motion to Dismiss and alternative Motion for Summary Judgment again acknowledged that it had not read the Depositions in conjunction with Petitioner's Brief in response to Respondents' Motion. (Tr. 513a) The Court was predisposed to grant Respondents' Motion for Summary Judgment and did not request supplemental briefs or arguments regarding the issue of arbitrary and capricious dismissal, or breach of contract but rather announced that he was not going to be the first judge in the United States to start deciding whether a student passes a course or not. (Tr. 521a) Instead, the Court isolated the issue of whether or not Petitioner had an opportunity to be heard and allowed the parties' respective counsel to prepare a chronological sequence leading up to the ultimate dismissal of Petitioner. (Tr. 522a)

Thereafter, the course of proceedings involved the filing by Respondents of a Brief Regarding the Due Process Issue with unverified attachments which

apparently were filed directly with the Court and which do not appear on the docket entry sheet. (Docket entries, 4a) Petitioner filed a Supplemental Brief in Response to Respondents' Motion for Dismissal on January 10, 1979 and a Reply to Respondents' Brief Regarding Due Process was filed on February 13, 1979 by Plaintiff. (Docket entries, 4a)

On April 5, 1979, Honorable James P. Churchill rendered a memorandum opinion consisting of one page (576a) with no findings of fact wherein the Court specifically refers to a review of the chronology of events with supporting documents presented in the Supplemental Briefs supplied by Respondents and Petitioner as the basis for granting Respondents' Motion for Summary Judgment and determined that Petitioner was not denied due process under the Fourteenth Amendment and that the Respondents did not dismiss him in an arbitrary and capricious manner and that the dismissal procedure followed satisfied the requirements of *Board of Curators* vs. *Horowitz*, 435 US 78; 98 S Ct 948; 55 L Ed 2d 124 (1978) (567a). The Court entered its own Order Granting Respondents' Motion for Summary Judgment based on the reasons stated on the record in open Court on December 22, 1978 and set forth in its Memorandum Opinion (577a) and rendered its Judgment accordingly, which was filed April 5, 1979 (578a).

On May 2, 1979, Petitioner filed a Notice of Appeal (579a), Proof of Service and Appeal Bond. (Docket entries, 4a-5a)

Because the District Court Judge did not make any findings of fact in his Memorandum Opinion, Judgment and Order, but rather only announced that as a matter

of law Respondents were entitled to an Order granting Respondents' Motion for Summary Judgment based on a review of the chronology of events exhibited in Respondents' Supplemental Brief and, because Petitioner's assertion on appeal is that there are many genuine issues of materia. fact precluding the action of the District Judge, a statement of facts relevant to the issues presented for review are substantially disputed by the parties and cannot be represented to this Honorable Court as an accurate rendition of facts. Petitioner can only stipulate that the undisputed facts are that Mr. Minye was dismissed on January 7, 1977 for the first time without a hearing. On January 21, 1977 he attended an Executive Committee Meeting but did not participate in the discussion for fear of being disrespectful. On February 22, 1977 Petitioner wrote a letter requesting readmission and personal appearance but it was not granted. On February 25, 1977 the Executive Committee met and considered the letter from Petitioner but took no action. A telephone call from Dr. William Cash, assistant to the University President, regarding the dismissal of Mr. Minye was discussed by Dr. Doerr at this Meeting. (Doerr Depn. 241a)

On April 8, 1977, the Executive Committee met and voted to readmit Mr. Miyne to start the summer term. In June of 1977 Petitioner was readmitted to Summer Term in Clinical Operative Dentistry and Periodontics (Doerr Depn., 242a) where he encountered the same instructors who had originally failed him.

Petitioner's experience during the summer of 1977 led him to believe that untrue information was being submitted by the chairman of the Operative Dentistry and Clinical Periodontics departments which ultimately resulted in his dismissal by the Executive Committee in

January of 1977. Therefore, he wrote a letter dated July 25, 1977 to Dr. Robben W. Fleming, University President, claiming intellectual dishonesty on the part of the faculty with a design to removing him from the program, motivated by personal feelings of disfavor.

On August 23, 1977, Dean Doerr composed a letter to Petitioner dated August 23, 1977, indicating that the Executive Committee had decided that he could not return to school based on his failure to pass Operative Dentistry and Periodontic Clinic in the summer of 1977. However, the Executive Committee had not met but, rather, a telephone survey was made on August 23 and 24, 1977, (after the composition of the letter from Dean Doerr), wherein certain members of the Executive Committee away on vacation voted to dismiss Petitioner. (Koran Depn., 209a-210a; Petitioners' Ans. Ex. C, 40a)

The chronology of events submitted by Respondents' attorney in his Supplemental Brief Re: Due Process Issue are subject to dispute and the facts as to the arbitrary and capricious dismissal of Petitioner and the opportunity to be heard after his dismissal on August 26, 1977 are disputed, are fully discussed in the Deposition testimony and other pleadings and served as the basis for Petitioner's request for reversal in that such disputed facts are material and raise genuine issues which Petitioner contends should preclude Summary Judgment.

Petitioner was granted oral argument before a 3 member panel of the Sixth Circuit Court of Appeals heard on June 2, 1980. The Sixth Circuit Court affirmed the lower Court Summary Judgment by Order dated June 17, 1980.

REASONS FOR GRANTING THE WRIT

I.

WHEN RULING PURSUANT TO A MOTION FOR SUMMARY JUDGMENT BASED ON NO GENUINE ISSUE OF MATERIAL FACT, RULE 56(d), FEDERAL RULES OF CIVIL PROCEDURE, THE TRIAL JUDGE IS REQUIRED TO EXAMINE THE PLEADINGS AND THE EVIDENCE BEFORE IT, ASCERTAIN WHAT MATERIAL FACTS EXIST AND RENDER ONLY A PARTIAL SUMMARY JUDGMENT IF ALL CAUSES OF ACTION STATED IN THE COMPLAINT ARE NOT ADJUDICATED.

At the hearing held on December 22, 1978 before the Honorable James P. Churchill pursuant to Respondents' Motion for Dismissal under Rule 12(B) or in the alternative, a Motion for Summary Judgment based on no genuine issue of material fact, Rule 56, the Court was aware of the identified claims alleged in Petitioner's Complaint. His Complaint contained allegations that 1.) He was discriminated against on the basis of national origin, 2.) Arbitrarily and capriciously dismissed from the University, 3.) Was denied the protection of the Fourteenth Amendment due process procedures after his ultimate dismissal in August 1977, 4.) His contract with the University was breached, 5.) Certain members of the faculty acted in concert in conspiring to assure his ultimate dismissal. In fact, the Court at Page 12 (500a) of the Hearing transcript is told by Mr. Davis, attorney for the Respondents, that Petitioner has stated a cause of action in his Complaint and the Court and Mr. Davis agreed that the national origin discrimination allegation gave rise to a question of fact, (Tr. 12 (500a)) In fact, the Court specifically refers to the lists of grievances "including some things

that bring him close to suspect category, foreign-born, speech, that sort of thing." (Tr. 499a)

The hearing was severely limited by the eventual question and answer session which resulted in the Court never again addressing the national-origin discrimination claim of Petitioner or the breach of contract claims. Instead, a brief discussion of Petitioner's arbitrary and capricious dismissal took place which also resulted in the Court admitting that it had not read all of the depositions (Tr. 503a) and perhaps should not have been expected to read all of the depositions unless "You got one little deposition that's fine." (Tr. 513a) The Court went on to state "I am not at the moment asking you for further briefs or argument or supplement about whether anything was arbitrary and capricous or not" and went on to state "I may very well grant your Motion for Summary Judgment," announcing to counsel that he was not going to be the first judge in the United States to start deciding whether somebody passes a course or not. (Tr. 521a) A brief analysis of the Memorandum Opinion of the Court issued April 4, 1979, further reflects and corroborates that Judge Churchill had not considered Petitioner's Brief in Reply to Respondents' Motion which contained evidence of arbitrary and capricous dismissal but, rather, predicated his opinion on the chronology of events supplied by the attorney for the Respondents. (576a)

Petitioner's Complaint stated a cause of action under 42 USC 1983 and 42 USC 1985 alleging deprivation of civil rights and conspiracy to interfere with his civil rights and further alleging deprivation of rights conferred pursuant to the United States Constitution, Amendments I, V and XIV. (Complaint, 7a) The Court

not having disposed of the claimed violations of 42 USC 1983 and 1985, not having disposed of Petitioner's claim that he was denied equal protection under the laws of the United States Constitution because of national-origin discrimination and not having disposed of the pendent issue of breach of contract, the Court should not have dismissed the entire Complaint of Petitioner, but, rather, should have appropriately rendered a partial summary judgment after stating the facts as found by the Court and determining that as a matter of law respondents were entitled to a partial summary judgment, if any. None of this occurred.

Aside from the authority provided in Rule 56(d), Federal Rules of Civil Procedure, authority for rendition of a partial summary judgment is found in 73 Am Jur 2d 41 citing *Sumitomo Shoji New York, Inc.* vs. *Isbrandtsen Company*, 23 App Div 2d 752, 258 NYS 2d 1020 and *Gaylord* v. *Gaylord*, 271 App Div 1045, 68 NYS 2d 513.

Although not specifically set forth in Petitioner's Complaint, the allegations contained in his Complaint state a cause of action under the Michigan Elliot-Larson Civil Rights Act effective March 31, 1977, cited as MCLA 37.2401, Article IV. That act defined civil rights and prohibits discriminatory practices, policies and customs based upon, inter alia, national origin. It also prohibits concerted effort in the form of conspiracy by one or more persons against a person because he has opposed a violation of the Act. Judge Churchill clearly pointed out and defense counsel clearly agreed that the allegations in Paragraph 15 and 16 of Petitioner's Complaint stated a cause of action based on national origin. (Tr. 499a-500a)

The Deposition of Mr. Minye is replete with examples which are tanamount to conspiracy to retaliate against Mr. Minye for his Complaint to the University President regarding prejudice. An extreme example of the intense prejudice of Dr. Kahler, one of the Petitioner's Clinical Operative Dentistry instructors, occurred during the summer of 1977 when Dr. Kahler determined that he would administer certain written didactic examinations to Mr. Minye after which he failed him on each examination, despite the fact that his answers were almost exactly as written in the textbook from which Mr. Minye had learned the subject matter. (Minye Affidavit, 444a-488a) When there is a deliberate failure of three written examinations and the answers circled by Dr. Kahler as wrong directly corresponded with the textbook, then judicial review is appropriate and certainly raises a question of fact as to whether conspiracy or retaliation actually occurred. *Gaspar* vs. *Bruton*, 513 F 2d 843 (1975) is such a case arising out of 42 USCA 1983 violations alleged by a nurse against a vocational-technical school. The *Gaspar* Court recognized that where there is a clear showing that the officials have acted arbitrarily or have abused the discretionary authority vested in them, then judicial review is authorized. *Gaspar*, supra, at 850 citing 39 ALR 1019; *Foley* vs. *Bennedict, et al*, 122 Tex. 193, 55 SW 2d 805 (1932); Anno. 86 ALR 484.

The question must be asked: Why did the trial court not dispose of all issues recognized by the Court and identified in the Petitioner's Complaint before rendering final summary judgment?

Petitioner was not afforded the full use of judicial review and procedures provided by law and Court rule.

II.

ACCORDING TO THE TRIAL JUDGE'S MEMORANDUM OPINION, THE GRANTING OF RESPONDENTS' MOTION FOR SUMMARY JUDGMENT WAS BASED ON THE UNVERIFIED CHRONOLOGY OF EVENTS GLEANED FROM UNVERIFIED SUPPORTING DOCUMENTS PRESENTED IN RESPONDENTS' SUPPLEMENTAL BRIEF, THUS, THE SUMMARY JUDGMENT WAS RENDERED BASED ON UNVERIFIED, INADMISIBLE HEARSAY EXHIBITS WITHOUT ACCORDING PETITIONER A HEARING ON THE CRITICAL ISSUE OF GENUINE ISSUE OF MATERIAL FACT CONTRARY TO LAW.

After the December 22, 1978 hearing on Respondents' Motion for Summary Judgment, the trial Judge took the matter under advisement and instructed both counsel to supplement their briefs regarding the chronology of events leading to the Respondents' actions after ultimate dismissal of Petitioner. He foreclosed any further arguments, submission of evidence or briefs regarding Petitioner's claim of arbitrary and capricious evaluation, national-origin discrimination in violation of Amendment V and XIV and breach of contract.

Counsel for Respondents then submitted Respondents' Brief Re: Due Process Issue serving Petitioner's counsel with a copy of that Brief on February 6, 1979, although the lower Court docket entries do not indicate that such a Brief Re: Due Process Issue was ever filed in the District Court.

Respondent's Brief Re: Due Prodcess Issue was simply an annotated chronology of events compiled by the attorney for Respondents, stating the date, the event, and commentary by the attorney and an exhibit number and four vertical columns. Commentary of the

attorney regarding alleged facts are grossly in dispute. Attached to Respondents' Brief Re: Due Process Issue were 30 exhibits, most of which were incomplete on their face, some of which were unsigned, and most of which were unverified, unauthenticated, not certified and otherwise absolutely hearsay and inadmissible as evidence.

Very important language in the Federal Business Records Act. 28 USC 1732 and Rule 1005, Federal Rules of Evidence, requires that reproduced documents be *satisfactorily identified*. In fact, the United States Supreme Court has specifically addressed admission of documentation as evidence under 28 USC 1732 and Rule 1005 Federal Rules of Evidence. *Adickes* vs. *S.H. Kress & Company*, 398 US 144, 159; 90 S Ct 1598, 26 L Ed 2d 142 (1970) was a case in which unsupported statements were held to be precluded from consideration pursuant to a Motion for Summary Judgment.

A case directly on point arising out of the Ninth Circuit Court of Appeals is *United States vs. Dibble*, 429 F 2d 568 wherein the authentication requirement for documentation was not satisfied merely by attaching the documents to an Affidavit offered on Motion for Summary Judgment. See Moore on Federal Practice 56.11 [1.-8] and cases cited therein. In the case of Petitioner herein, not even an Affidavit was offered in support of the unverified attached documents.

After receiving such scanty, unverified documentation from Respondents' attorney, the trial Court should have immediately scheduled an evidentiary hearing. When questions of ill will, intention and bad faith have been raised, the Court is not authorized to render a Summary Judgment based on

no genuine issue of material fact until an evidentiary hearing is held. The United States Court of Appeals, Sixth Circuit, in the case of *Robert Willets vs. Ford Motor Company and United Auto Workers of America, Local 898*, 583 F2d 852 involved an action brought by a former employee of Ford Motor Company for discharging him in violation of collective bargaining agreements and against the union for alleged failure to represent him fairly with respect to grievances concerning his discharge. Although the granting of Summary Judgment for Respondents by Judge Philip Pratt, Eastern District of Michigan, was upheld for the reason that the Plaintiff had not exhausted his union remedies, the Sixth Circuit Court of Appeals was explicit in holding that entry of Summary Judgment was improper where the District Court was required to hold an evidentiary hearing and then resolved disputed issues of fact. Judge Pratt held such a hearing but even then the Court of Appeals determined that he inappropriately granted the Summary Judgment because he attempted to resolve disputed issues of fact as opposed to determining whether they existed. No such hearing was afforded Petitioner.

The inadequacy of the record and the faulty basis upon which the Motion for Summary Judgment was granted clearly mandate a reversal, at least so that an evidentiary hearing can be afforded Petitioner in order to satisfy the Court that there either are or are not genuine issues of material fact.

III.

THE TRIAL JUDGE AND COURT OF APPEALS, SIXTH CIRCUIT, FAILED TO CONSIDER THE FACTS OF PETITIONER'S CASE IN VIEW OF BOARD OF CURATORS VS . HOROWITZ, 435 US 78; 98 S Ct 948; 55 L Ed 2d 124 (1978) and GREENHILL vs. BAILEY, 519 F 2d 5 (Ca 8 1975) IN THAT PETITIONER WAS NOT EVEN AFFORDED MINIMAL DUE PROCESS AND THE STIGMATIZING EFFECT OF RESPONDENTS' LETTER TO OTHER DENTAL SCHOOLS REMOVES THE CASE FROM THE TYPICAL INSTANCE OF ACADEMIC DISMISSAL AND CALLS FOR GREATER PROCEDURAL PROTECTION.

Petitioner was dismissed for the first time from the University of Michigan School of Dentistry in January of 1977 for failure of clinical courses, Periodontics and Operative Dentistry. Despite Respondents' contentions, he was not dismissed in 1973, but rather, was required to repeat Oral Pathology 518 after being guaranteed readmission in the winter of 1974. He was readmitted and received a B grade. (45a-56a; 542a) The facts in this case are particularly crucial in that the Order of the Sixth Circuit Court of Appeals (Appendix D) erroneously recites that Mr. Minye was actually dismissed from the dental school three times and twice readmitted and that each time on readmission, he failed *two* vital clinical courses. Failure of two vital clinical courses did not occur on each readmission. It only occurred on one readmission; therefore, it is clear that the Sixth Circuit Court of Appeals was unaware of the undisputed record of Petitioner's dental school career.

After the January, 1977, dismissal, Petitioner wrote a letter to the Executive Committee requesting reconsideration but the Committee reaffirmed its

position. Petitioner did not participate in the discussions out of fear of being disrespectful. (Exhibit 23, pg. 1 (562a, 569a))

Thereafter, Petitioner wrote a letter to President Flemming regarding his dismissal from school and the letter was referred to Dr. William Cash who contacted Dean Doerr of the School of Dentistry. (Doerr Depn., 241a) Mysteriously, on April 8, 1977 it is undisputed that a meeting of the Executive Committee took place wherein it voted to readmit Mr. Minye. The minutes of that Executive Committee meeting do not indicate any status other than as a regular student. (Doerr Depn., 242a-243a)

The undisputed facts are that, of 150 students in his class, only Petitioner was subjected to re-evaluation by written examination in Operative Dentistry without the benefit of refresher courses or additional tutelage, even though he had passed all the required written and clinical examinations. Three examinations were given by Dr. Kahler and Dr. Pape. (Kahler Depn., 376a-378a) After completing the examinations he was told that he failed all three of the examinations given to him in the summer of 1977. (Affidavit of Petitioner 444a-446a)

As previously pointed out, several of the answers that were marked wrong by Dr. Kahler were in fact correct according to the textbook used in the teaching of dentistry. (Petitioner's Affidavit, 444a-446a) This is only one example but a prime example of the arbitrary and capricious nature of the evaluation process during the summer of 1977 and certainly raises a question as to the conspiracy or retaliation by certain members of the faculty and raises further questions about due process afforded Petitioner.

During the course of the summer of 1977, Petitioner was subjected to over 50 identifiable situations, treated

hereafter, which virtually assured, that, no matter what Petitioner did during the summer of 1977, he was going to fail the repeated courses in Operative Dentistry and Periodontics.

Petitioner was given no opportunity, no notice and summarily dismissed by a telephone poll of the voting members of the Executive Committee on August 23 and 24, 1977. (Doerr Depn., 217a-219a)

Thus, after having been readmitted to repeat two clinical courses during the summer of 1977, Petitioner failed three written examinations, failed both clinical courses, the final grades for the courses were conveyed to the Executive Committee which met by telephone on August 23 and 24, 1977 and was summarily dismissed from the program without recourse. No review procedure was afforded.

Contrary to the representations by the University attorney to Judge Churchill on December 22, 1978, when pressed for hard evidence that Petitioner had an opportunity to appeal the ultimate dismissal, there is no hard evidence and it never was produced for Judge Churchill as requested. (December 22 Tr., 507a-510a)

The case of *Board of Curators vs. Horowitz*, 435 US 78, 98 S Ct, 948, 55 L Ed 124 (1978) was predicated upon facts dissimilar to those of Petitioner. In *Horowitz*, the academic dismissal of Ms. Horowitz at the University of Missouri-Kansas City Medical School was preceded by several due process safeguards before and after her ultimate dismissal. Charlotte Horowitz was afforded due process safe-guards in that 1.) A counsel of evaluation composed of a faculty-student body existed to recommend various actions, including probation and dismissals; 2.) Those recommendations were reviewed

by the Faculty Coordinating Committee; 3.) Ultimate approval was given by the Dean; 4.) An appeal process of the ultimate decision to dismiss Charlotte Horowitz was granted; 5.) Ms. Horowitz was allowed to demonstrate her proficiency to seven *independent* practicing physicians; 6.) And after the reports from the independent practicing physicians were received, the council then reviewed their prior decision; 7.) The council then reviewed another post-dismissal surgery rotation; 8.) And finally Ms. Horowitz was allowed to appeal to the Provost who sustained the decision to dismiss her. The *Horowitz* Court did not indicate that such broad procedural due process as was afforded Ms. Horowitz is required, however, the *Horowitz* facts and the Court in the case of *Tomanio vs. Board of Regents of University of the State of New York*, 603 F 2d 255, (1979) clearly indicate that "impartial fact finders" are required to satisfy minimal due process.

Petitioner recognizes that the *Horowitz* Court distinguished between requirements of due process in the case of disciplinary actions as opposed to academic dismissals. However, the *Horowitz* Court cited the case of *Greenhill vs. Bailey*, 519 F 2d 5 (Ca 8 1975) which indicated that when a dismissed student is stigmatized by circulation of the reasons for his academic dismissal, especially as they relate to deficiencies in the student's intellectual ability, then greater procedural protections are required. *Board of Curators vs. Horowitz, supra*, Footnote 5.

Here, Petitioner was not only denied the due process afforded Ms. Horowitz, but was grossly stigmatized by the University of Michigan School of Dentistry after his ultimate dismissal. The School of Dentistry took it upon itself to explain to other dental schools why Petitioner

was dismissed from the University of Michigan Dental School by virtue of a letter it disseminated and which Respondents attached to the Answer to Complaint and designated as Exhibit B. (1 Pg., 39a) In that letter, composed by Robert E. Doerr, Associate Dean, Respondents themselves corroborated to a certain degree that Petitioner was not dismissed on purely academic ground, but that the University and apparently his immediate instructors understood that Petitioner's background, (a refugee from Communist Hungary) interfered with his relations with his instructors. The third full paragraph of the letter attached to Respondents' Answer designated as Exhibit B is as follows:

> "I feel that Mr. Minye's background makes it difficult for him to communicate effectively with people. Furthermore, this lack of communication is to a significant degree responsible for many of his academic problems. He is a complex young man, with many personal concerns regarding his family. To what extent his different personality influences his clinical evaluation I am not sure, but it is my opinion the potential exists." (Respondents' Answer, Exhibit B, 1 Pg., 39a)

The Associate Dean of the University of Michigan School of Dentistry specifically states that Petitioner's background "is to a significant degree responsible for many of his academic problems."

The *Greenhill* Court was of the opinion that "the publicization of an alleged deficiency in the student's intellectual ability removed the case from the typical instance of academic dismissal and calls for greater procedural protections." *Board of Curators vs. Horowitz, supra,* Footnote 5. Is not such a stigmatizing letter as

was written by Associate Dean Doerr regarding Petitioner one that removes the case from the typical instance of dismissal and calls for some greater form of procedural protection upon his ultimate dismissal after the summer of 1977? Does it not raise a substantial question of fact as to whether Petitioner's national origin and Amendment V and XIV claims are true, or, at least, worthy of a trial?

IV.

THE TRIAL COURT'S REFUSAL TO REVIEW THE DEPOSITIONS, AFFIDAVITS AND PLEADINGS WHEREIN HE COULD HAVE DISCOVERED OVER 50 IDENTIFIABLE ISSUES OF FACT RESULTED IN A DENIAL OF JUSTICE AND A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS TO THE EXTENT THAT SUMMARY JUDGMENT BASED ON NO GENUINE ISSUE OF MATERIAL FACT WAS TOTALLY ERRONEOUS.

Petitioner's Complaint clearly illustrated allegations of ill will or bad motive, bad faith, arbitrariness, capriciousness and discrimination. The pleadings, Affidavits and Depositions substantiate those allegations.

In such cases, the United States Supreme Court in the *Horowitz* case, specifically recognized that such circumstances are reviewable if "shown to be clearly arbitrary or capricious," citing *Mahavongsanan vs. Hall*, 529 F 2d 448 (Ca 5 1976) at 449 and *Gaspar vs Bruton*, 513 F 2d 843, Ca 10 (1975) at 850. *Horowitz, supra*, at 956. The Memorandum Opinion of Judge Churchill (Appendix A) is a one-page document consisting of four paragraphs with absolutely no findings of fact. The two concepts of violation of 14th Amendment rights

vis-a-vis arbitrary or capricious dismissal are separate and distinct. In order for Judge Churchill to determine that the claims of arbitrary dismissal or bad faith conspiracy or retaliation by Respondents against Petitioner leading up to his ultimate dismissal are fairly disputed precluding Summary Judgment, he must either conduct a tedious comparative analysis of the deposition testimony, exhibits and affidavits or an evidentiary hearing. If the lower Court was not inclined to review all of the voluminous evidence elicited by Petitioner contained in the Depositions, then an evidentiary hearing to determine whether or not a genuine issue of material fact existed was necessary. See *Willits vs. Ford Motor Company*, 583 F 2d 852 (1978)

Petitioner's Appeal Brief in the Sixth Circuit Court of Appeals outlines over 50 specifically identifiable genuine issues of fact too lengthy to be included herein. Any one of those itemized issues of fact was sufficient to preclude a Final Summary Judgment.

The contradictions between not only the deposition testimony of Petitioner and his instructors, but between the instructors themselves, are instantly recognizable as genuine issues of material fact precluding Summary Judgment. The proper approach of Judge Churchill would have been to review the Deposition testimony, or in the alternative, hold a hearing with representative witnesses who could satisfy the Court that either a genuine issue of material fact existed or did not exist. None of this occurred.

> "As the Supreme Court observed in *Adickes vs. Kress & Company*, the Advisory Committee on the 1963 Amendments to Rule 56 expressly rejected the idea that subdivision (a) altered the

> ordinary standards of proof in a Motion for Summary Judgment:
>
> 'Where the evidentiary matter in support of the Motion does not establish the absence of a genuine issue, Summary Judgment must be denied *even if no opposing evidentiary matter is presented.*'
>
> 398 US at 160, 90 S Ct at 1610 (emphasis in original), quoting Advisory Committee notes on 1963 to Rule 56." *Felix vs. Young*, 536 F2d 1126 at 1135 (1976). Also see *Poller vs. Columbia Broadcasting System*, 368 US 464, 82 S Ct 486 (1961).

Evidentiary matter presented by Respondents in support of the Motion was wholly deficient. Petitioner's evidence of numerous instances of genuine issues of fact, and depositional evidentiary matter opposing the Motion properly required the Trial Court to deny Respondent's Motion for Summary Judgment.

RELIEF REQUESTED

For the reasons above set forth, Petitioner respectfully prays this Court issue its Writ of Certiorari in this case to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

STEVEN STELMACH, JR. (P24866)
Attorney for Petitioner
2970 East Big Beaver Road
Troy, Michigan 48084
Telephone: (313) 689-5696

Of Counsel:
Steven Haffner (P24794)
25130 Southfield
Suite 102
Southfield, Michigan 48075
(313) 559-2970

Dated: August 6, 1980

APPENDIX A

MEMORANDUM OPINION

(United States District Court
Eastern District of Michigan
Southern Division)

(Filed April 5, 1979)

(Leslie Minye, Plaintiff, vs University of Michigan, et al., Defendants. Civil No. 77-72421)

After oral arguments on December 22, 1978, the Court took under advisement, and requested supplemental briefs on, the defendants' motion to dismiss and/or for summary judgment. Supplemental briefs have been received and considered.

Prior to taking the motion under advisement on December 22, the Court made it clear on the record that unless the plaintiff presented some evidence that the defendants were arbitrary and capricious in their dismissal of the plaintiff from dental school, summary judgment would be granted in favor of the defendants.

It is clear from reviewing the chronology of events with supporting documents presented in the supplemental briefs that the plaintiff was not denied due process under the Fourteenth Amendment and the defendants did not dismiss him in an arbitrary or capricious manner. The procedure for dismissal followed in this case satisfies the requirements of *Board of Curators v. Horowitz*, 435 U.S. 78, 98 S. Ct. 948, 55 L.Ed.2d 124 (1978).

An order shall issue granting the defendants' motion for summary judgment.

/s/ JAMES P. CHURCHILL
UNITED STATES DISTRICT JUDGE

Dated: April 4, 1979

APPENDIX B

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(United States District Court
Eastern District of Michigan
Southern Division)

(Leslie Minye, Plaintiff, vs University of Michigan, et al., Defendants. Civil No. 77-72421)

At a session of said court held in the Federal Building and U.S. Courthouse, Detroit, Michigan, on April 4, 1979.

Present: HONORABLE JAMES P. CHURCHILL
United States District Judge

For the reasons stated on the record in open court on December 22, 1978, and set forth in a Memorandum Opinion bearing this date, IT IS ORDERED that the defendants' motion for summary judgment be and hereby is GRANTED.

IT IS SO ORDERED.

Let judgment enter accordingly.

/s/ JAMES P. CHURCHILL
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

It is hereby certified that a copy of the ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT hereon and accompanying MEMORANDUM OPINION and JUDGMENT were

served upon David H. Fried, Esq., Craig, Fried & Heidt, 1710 Buhl Building, Detroit, MI 48226; Peter A Davis, Esq., Davis and Fajen, 320 North Main Street, Suite 400, Ann Arbor, MI 48104; and Roderick K. Daane, Esq., General Counsel, University of Michigan, 4020 Administration Building, Ann Arbor, MI 48109; by depositing same in the United States mail at Detroit, Michigan, on April 5, 1979.

/s/ Diane J. Phillips
Secretary to Judge Churchill

APPENDIX C

JUDGMENT

(United States District Court
Eastern District of Michigan
Southern Division)

(Filed April 5, 1979)

Leslie Minye, Plaintiff, vs University of Michigan, et al., Defendants. Civil No. 77-72421)

The Court having entered an Order Granting Defendants' Motion for Summary Judgment based upon its review of the defendants' motion for summary judgment and upon its review of the file and having determined that the movants are entitled to the relief sought;

IT IS ORDERED AND ADJUDGED that the action be dismissed in accordance with the Memorandum Opinion and Order filed on April 5, 1979.

Dated at Detroit, Michigan, this 5th day of April, 1979.

ARTHUR J. MORSCH, JR.
ACTING CLERK OF THE COURT

By /s/ Lillian Brooks
Deputy Clerk

Approved:

/s/ James P. Churchill
United States District Judge

APPENDIX D

ORDER

(United States Court of Appeals
For the Sixth Circuit)

(Filed June 17, 1980)

(Leslie Minye, Plaintiff-Appellant vs University of Michigan, et al, Defendants-Appellees. 79-1325)

Before: EDWARDS, Chief Judge, WEICK and JONES, Circuit Judges.

Appellant Minye appeals from Judge Churchill's entry of summary judgment in favor of the University of Michigan after extensive discovery and depositions before him in Minye's 42 U.S.C. § 1983 suit. Minye's essential claims are that the University of Michigan, after admitting him to its dental school dismissed him in violation of his equal protection and due process rights.

Minye claims that his status as a refugee from Hungary provoked prejudice against him on the part of the dental school faculty. He did not, however, present evidence to Judge Churchill which served to persuade him or us to this effect.

The record clearly demonstrates that the University of Michigan Dental School gave him three separate chances before finally dismissing him. Minye was actually dismissed from the dental school three times and twice readmitted. Each time on readmission, he failed two vital clinical courses.

On this record, we are unable to find that the defendant violated either equal protection or due process or that the District Judge committed any error in granting summary judgment for the defendant.

The judgment of the District Court is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

ISSUED AS MANDATE: July 9, 1980
COSTS: NONE